INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statutes and Constitutional Provisions Involved 3

Statement of the Case 3

A. The Evidence at the Trial 3

B. The Decision of the Court of Appeals 13

REASONS FOR GRANTING THE WRIT 15

CONCLUSION 22

APPENDICES:

A. Opinion of the United States Court of Appeals i

B. Judgment x

C. Order Denying Petition for Rehearing xi

D. Statute Involved xii

TABLE OF AUTHORITIES

Cases:

Atwell v. *United States*, 398 F.2d 507 (5th Cir. 1968) 15

Bruton v. *United States*, 391 U.S. 123 (1968) 15, 16, 18, 19, 20, 21, 22

PAGE

Davis v. *Sigler*, 415 F.2d 1159 (8th Cir. 1969) 15
Douglas v. *Alabama*, 380 U.S. 415 (1965) 18
Dutton v. *Evans*, 91 S.Ct. 210 (1970) 20
Harrington v. *California*, 395 U.S. 250 (1969) 21
Nelson v. *O'Neil*, No. 336, O. T. 1970, *cert. granted* November 9, 1970 22
O'Neil v. *Nelson*, 422 F.2d 319 (9th Cir. 1970), *cert. granted*, 91 S.Ct. 136, No. 336, O. T. 1970 (Nov. 9, 1970) 15, 18, 22
Serio v. *United States*, 401 F.2d 989 (D.C. Cir. 1968), *reversing* 377 F.2d 936 (1967), *vacated and remanded*, 392 U.S. 305 (1968) 15, 17
Townsend v. *Henderson*, 405 F.2d 324 (6th Cir. 1968) .. 15
United States v. *Jones*, 402 F.2d 851 (2d Cir. 1968), *reversing* 374 F.2d 414 (1967), *vacated and remanded*, 392 U.S. 299 (1968) 15
United States v. *Sims*, 430 F.2d 1089 (6th Cir. 1970) 19, 20, 22
United States ex rel. Labelle v. *Mancusi*, 404 F.2d 690 (2d Cir. 1968) 15, 17
West v. *Henderson*, 409 F.2d 95 (6th Cir. 1969) 15

Constitutional Provision:

United States Constitution
Sixth Amendment 2, 3, 15

Statute:

62 Stat. 763, as amended, 63 Stat. 94, 18 U.S.C. §1341 3

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

HAROLD K. BAKER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Harold K. Baker, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted at pages i to ix of the Appendix (hereafter "App."). It is not yet reported. An order denying rehearing was entered without opinion (App. xi).

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1970 (App. x). A timely petition for rehearing was denied on November 18, 1970 (App. xi). An

order extending the time to file this petition until January 17, 1971 was entered by Mr. Justice White on December 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioner was General Manager of an Albuquerque wholesale distributor engaged in the business of supplying goods to the Atchison, Topeka and Santa Fe Railway (the Santa Fe). He and a co-defendant, named Gurule—who was simultaneously employed both as a salesman by the supplier and by the railroad's purchasing department—were jointly indicted, tried and convicted of using the mails to defraud. The alleged fraud was that they caused the Santa Fe to pay for personal property items invoiced against purchase orders which, on their face, specified railroad parts. Both defendants received a commission from the supplier on sales to the railroad. Petitioner's defense was that he in good faith believed that the railroad had authorized the substitution practice. The president of the supplier testified that the Santa Fe had in fact authorized that practice and was aware of Gurule's dual employment. Two railroad officials acknowledged that local "bootlegging" of different materials against Santa Fe purchase orders was commonly and openly practiced by the railroad's local purchasing department, in order to avoid the need to obtain procurement approval from the railroad's main offices in Chicago and Topeka.

The question presented is whether petitioner's constitutional right to confront adverse witnesses—as required by the Sixth Amendment of the Constitution of the United

States—was violated by the admission into evidence against him of third-party testimony concerning an extra-judicial confession of fraud by Gurule, petitioner's co-defendant, when (a) the trial court, over objection, allowed that confession to be considered against petitioner, refusing even an instruction that it was inadmissible against petitioner; and (b) petitioner's co-defendant, testifying in his own behalf, denied making the confession.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is the Federal Mail Fraud Statute, 62 Stat. 763, as amended, 63 Stat. 94, 18 U.S.C. § 1341. (App. xii).

The Constitutional provision involved is the Sixth Amendment of the Constitution of the United States insofar as it provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. *The Evidence at the Trial*

1. This case arose from a course of dealing, during the years 1966 and 1967 (803-05),[1] between the New Mexico Division of the Santa Fe and one of its suppliers located in Albuquerque, New Mexico, named Hills Auto Electric

[1] All numerical references are to the pages of the typewritten transcript of the trial testimony.

Co. ("Hills"). The Santa Fe was Hills' only customer (1325).

2. Hills' President was Mark H. Wilson, who testified as a prosecution witness (391 *et seq.*). Its two principal employees during the relevant period were the defendants. They were petitioner, a long-time employee hired in 1949 (489) who had become General Manager prior to the relevant events, and was in charge of Hills' procurement (402-03); and John E. Gurule, a stock foreman in the Santa Fe's purchasing department until August 1, 1967, when he became Material Supervisor (1038). Gurule had become a salesman for Hills in 1964 while retaining his job with the railroad (406, 462), and handled Hills' sales to the Santa Fe (404-05).[2]

3(a). Petitioner and Gurule were jointly tried and convicted of mail fraud because of Hills' substitution of a wide variety of personal property items—such as electrical appliances, coffee and lubricating oil—in filling Santa Fe purchase orders, which on their face called for railroad equipment supplies (422). Hills' total business with the railroad approximated $300,000 annually, of which a substantial portion consisted of railroad equipment supplies (514), together with an undetermined amount of substituted items (1559).

3(b). The items to be substituted were orally called in to petitioner by various people in the Santa Fe's purchasing office (501). Petitioner marked the invoices to Hills for these items with the number of the Santa Fe written pur-

[2] The other employees were Lawrence Roland, Hills' warehouseman, who also testified for the prosecution (512), and two truck drivers (512-13).

chase order for railroad material against which they were to be shipped (1128), and billed the railroad at Hills' cost plus 30% (1219).

4. On behalf of the prosecution, Wilson, Hills' President, testified, as follows:

(a) The Santa Fe and Hills had an agreement that personal property items might be sent in fulfillment of written orders calling for railroad equipment. To quote Wilson (422-23):

> "Q. One further question on these documents, Mr. Wilson:
>
> "Do you see on the Hill's purchase—I mean, the Railroad purchase order, anything like Sunbeam can openers, percolators, or anything listed, such as that? A. No, I don't, due to our agreement with the Railroad, they bought various items and varied items. Consequently with our agreement, we're liable to send them a TV or a can opener or a—whatever—all the rest of these items; whatever they asked for.
>
> "Q. You mean your agreement with the Railroad, or your agreement with Mr. Gurule? A. No, our agreement with the Railroad, we were to send them—we were to send them anything that they asked for, and bill it any way they asked us to bill it."

Wilson identified five Santa Fe officials—including its headquarters Vice President in Charge of Purchasing—to whom the agreement was known (448-49).

(b) Hills' invoices to the Santa Fe covering personal property were not "false" because "this was our agreement with the Railroad" (452). In Wilson's words: "[A]ctually we were an errand boy for the Railroad; whatever they

wanted, we got them. However they wanted them billed, we billed them" (453).[3]

(c) A purchasing official from the Santa Fe's Chicago office, named McHenry, advised Wilson of the reasons for the billing arrangement between Hills and the railroad (484). To quote Wilson (484-85):

> "A. Well, one of them is, the cost of a lot of these items, they said they cost them, I believe it was around twelve dollars to process a purchase order, which they would save money by throwing it in on a blank purchase order, is one of the reasons.
>
> "Another reason that was given, that if this merchandise, the--shavers and so forth—were billed out as parts for the shop, that this would have a different rate effect on their—when they make applications for various freight rates.
>
> "Q. I see. Were you given any cautions on how this matter; billing for purchase orders which had other items delivered; would affect you? A. Well, the only —yes, the only caution I was given, that they reserved the right to come in and check on our—our paper work, and also that they advised us that the ICC would have that right, or would take that right.
>
> "Q. And in keeping with this caution, did you establish a set of records which—by which you could easily trace— A. We definitely did.
>
> "Q. —these transactions? A. That's right, we did."

(d) As Hills' business grew, petitioner's duties became too burdensome to permit him to handle "the sales and contact end of the business with the Railroad" (404). Because "we needed a man to work with the Railroad, and it

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[3] Wilson was aware that Hills billed the Santa Fe for the cost of printing campaign literature used by Gurule in running for City Commissioner of Albuquerque (451) and for tickets to entertainment and sports events delivered to Gurule (504).

was a peculiar operation," Gurule was employed after "various people in the Railroad organization indicated that this might be a good marriage" (404-05). Gurule was paid a 7% commission on all sales to the railroad, while Baker received a salary plus 3½% (405). Wilson was "sure" that the Santa Fe officials, including several in Chicago, were "fully aware" that Hills had employed Gurule while he continued to be employed by the railroad (406).[4]

5(a). The record contains admissions, including pretrial statements to the FBI, by Santa Fe supervisory personnel —namely, Max F. Rahn, Assistant Superintendent of Work Equipment (787), and L. W. McClelland, Storekeeper (802)—that it was common and open practice at the Santa Fe Shops in Albuquerque to "bootleg material" against purchase orders calling for railroad supplies (813, 817, 817-30, 1110-19).[5]

5(b). According to Rahn, the purpose of the bootlegging was to avoid the necessity of obtaining approval from the

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[4] On cross-examination, Wilson testified "Actually, it was the Railroad that was the instigator of our hiring Mr. Gurule. . . . it was indicated to us that he would be a good man to be on our payroll" (489-90). He explained the reason why the railroad wanted Gurule "to have a moonlighting job," as follows (490):

> "Well, they thought an awful lot of Mr. Gurule on a labor relation and public relation basis, and like I said before, he was an employee of the Union, and of course, they could not do anything more for him, and by him going to work for us, why, naturally, they felt he would be compensated by us.
> "Q. I see. Was he so compensated? A. Yes, he was."

[5] Both disclaimed involvement in "bootlegging" personal items (1113-14, 1119). McClelland admitted he received many such items, but asserted he considered them "personal gifts to me" (823-28, 838).

Santa Fe's Chicago or Topeka offices (1111). Rahn acknowledged

> "'that in order to short-cut any red tape, it was common practice for some employee to order the material from one of the vendors, primarily Hill Auto Electric, and have the material billed as another item.'" (*Ibid.*)[6]

6. According to McClelland's statement to the FBI, Gurule was in complete charge of the Santa Fe's procurement in Albuquerque. As he put it (1115):

> "'[I]t appeared to him that Gurule was in supreme command at the Railroad, and that anyone who wanted to come to the Railroad to do business, or to attempt to make a sale on some merchandise, would not do so, even if requested by McClelland, before they had checked out John Gurule.'"[7]

7. Petitioner testified as follows:

(a) He started working for Wilson at Sandia Electric Company in 1949 and was transferred to Hills when Wilson bought it in 1950 (1123). Before the sale to Wilson, Hills was following the substitution procedure; petitioner continued it under Wilson's "instructions." "I was doing my job." (1126) Petitioner "was instructed to keep a complete set of records, referring purchase orders to invoices,

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[6] According to the Assistant to the Santa Fe's Vice President of Purchasing, purchase requisitions for capital items had to be processed through Chicago and would require a month to three months for approval (932-33).

[7] Among the items charged to the railroad were building supplies used to remodel Gurule's home (867, 876). Oil invoiced by Hills to the Santa Fe was sold by Gurule to railroad employees for their personal use, on a cash basis (535, 560, 571, 582, 603). Gurule also collected cash from Santa Fe employees for two television sets, given to retiring railroad employees, which were likewise billed by Hills to the Santa Fe (429, 430, 730-31).

so that any time the Santa Fe Railroad or anybody wanted to look at our records, they were open to them" (1127-28). It was explained to him that the reason he "had to keep a cross check on the items that were picked up, and weren't charged out as such . . . was an ICC standard accounting procedure" (1128).

(b) Petitioner was originally Hills' only employee, but became overburdened when the business increased (1128). At this time, Hills "made it be known that we were looking for a man," and a number of railroad officials—whom petitioner named—"suggested to us that Gurule would make us a good man" (1132-33).

(c) Before Hills hired Gurule, the railroad people at times ordered and received the substitute items directly, with instructions to the suppliers to invoice the goods to Hills (1129). This made it difficult for petitioner to match the supplier's invoices with the Santa Fe purchase orders against which the goods were billed (1129-30). After Gurule was hired, all orders "would be called directly to me [petitioner], and I would pick up the merchandise and deliver it to the Santa Fe Railroad, instead of them picking it up themselves." (1133)

(d) The items billed to the Santa Fe that did not appear on its orders "could be anything. It could be stationery supplies for the Santa Fe storehouse use, or for the Shop use . . ." "[I]t could be a television, it could be a radio, it could be virtually anything that they requested. Whatever they requested, we procured and delivered to them." (1134)

(e) Petitioner was familiar with the requisition and audit system used in the railroad shops, and described it

in detail (1141-46). It was such that "everybody would have had to have known about the arrangement." (1142) Petitioner met with various Santa Fe officials from its Topeka office—whom he also named—and with whom he discussed the handling of the items he had described (1147-48). None ever criticized the method of handling them or indicated that it was against company policy (1148).[8]

8(a). Dramatic testimony of an extra-judicial confession by Gurule—admitted against petitioner over objection—was received from a Santa Fe official, Leonard Roten, who had been transferred from California, in April 1967, to take charge of purchasing at the New Mexico Division (1038-48). This confession followed an investigation by Roten of all suppliers to that Division "to see if anyone from our place, had contacted them for any kick-back, or any type of dishonesty" (1045). His testimony to the jury was that he was motivated by suspicions aroused when "Hill's Auto Electric" failed to bill him for repairs to his automobile (1039).[9]

8(b). Roten described Gurule's resulting confession as follows (1046-47):

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[8] Petitioner received cash from Gurule, "maybe twenty times at most," for oil sold to Santa Fe employees, and put such receipts in Hills' petty cash box (1247). Gurule was giving Santa Fe employees, "especially Union employees, a break on the oil itself" (1247-48). The difference between Hills' cost for the oil and the amount paid by the employees was billed to the Santa Fe (1248). Petitioner similarly handled forty or fifty dollars in cash collected by Gurule from Santa Fe employees for two television sets presented to retiring Santa Fe employees (1248-49). He never kept any money received from Gurule (1249).

[9] Two other Santa Fe employees testified that they had similarly received free auto repairs from Hills, naming Baker as their contact (Baca, 539-41; McClelland, 803-04).

"And then, after we talked to our boss in Topeka, we called Mr. Gurule in, on December the 1st, that evening, and talked to him. We closed the door, just he and I, and I told him that it would be for his own interest and his own good, that he resign. If he didn't, that we would have to take further action."

"Q. All right, and what was his response, if any?

[Counsel's objections overruled.]

"A. Well, it was naturally a shock, but he said that that particular morning, he thought that he would never come to the place that he would think about taking his own life, and that he said that he had talked to his Priest that morning.

"Also, after that, he broke down and cried. He wanted to know how much money was involved, and he wanted to know if he could pay it back, and I told him that there was too much money for him to ever pay back, and of course, after that he tried to get me to assure him that no one would find out; that we would just keep it quiet, and I told him that I had to make the report to my superior, Mr. Watson, and from there, I could not say"

8(c). The District Court overruled contemporaneous objections by petitioner's counsel to the admission of the confession (1047-48), rejecting the claim that it was inadmissible "under the *Bruton* rule, and I feel this should be completely stricken, as long as Mr. Baker is a co-defendant in this action" (1048). The District Court also rejected a motion for petitioner's acquittal, at the end of the prosecution's case, made on the following grounds (1072):

"I feel that the admission by this Court of the testimony of Mr. Roten, relating to an alleged confession on the part of a co-defendant, is a violation of the *Bruton* rule, and entitles defendant Baker to an acquittal."

A limiting jury instruction was also refused (1584-85).

9. Another prosecution witness was Keith Skaggs, proprietor of Skaggs Autodraulics, also a Santa Fe supplier (1026). Gurule admittedly called on Skaggs in November 1966 with three railroad purchase orders (1031-32, 1295). According to Skaggs, Gurule requested $800 in cash, for items to be invoiced, but not delivered, to the railroad, stating that he "would sign for them" (1028-32). Skaggs further testified that he declined the proposal and reported it to the railroad (1033-34). Skaggs acknowledged that he had never met petitioner and that petitioner's name was never mentioned to him by Gurule (1034). In contrast to its treatment of Roten's testimony, the District Court instructed the jury that it could not consider Skaggs' testimony in relation to petitioner (1572).

10. Gurule testified in his own defense. He admitted meeting Roten, but throughout his direct and cross examination, denied making any confession (1298-99; 1307-11; 1352-55). Gurule testified generally that all of his activities were fully known to and sanctioned by the Santa Fe (1277-81). Gurule's version of his meeting with Skaggs was that he asked for the $800 at McClelland's request, but knew nothing of the reason for the request (1295). Gurule specifically testified "I can recollect vividly" that the remodeling of his home, at the railroad's expense, had been authorized following his election to the City Council in 1966, by a Santa Fe Bureau Chief in Topeka, named Val Sherrard (1282, 1283-84). The testimony of another Santa Fe official established that Sherrard had died in June of 1965 (1477).

11. Petitioner and Gurule defended on the ground that they had acted in good faith. The Court repeatedly informed the jury that "what is called 'good faith' [is] a

defense to a charge of mail fraud (1142; *see also* 1146, 1281, 1321) and so charged the jury as follows (1571):

> "Now, it is the contention of the defendants that the acts charged in the Indictment, even if done, did not defraud the Railroad, as they claim all acts done were for some purpose beneficial to the Railroad, and were authorized by an agreement or understanding with appropriate officials of the Railroad.
>
> "It is the futher (*sic*) contention of the defendants that even if the acts did constitute a fraud on the Railroad, that they, the defendants, did not act with intent to defraud, but that all of their actions were in good faith and with the honest belief that they were lawful and legitimate. Good faith is a complete defense to the crime of mail fraud."

12. The Court denied petitioner a jury instruction limiting Roten's testimony to the case against Gurule, but charged that Skaggs' testimony "may not be considered by you in any regard with respect to the defendant Harold Baker [petitioner]" (1572). In support of a limiting instruction on Roten's testimony, petitioner's counsel unsuccessfully argued that because of the instruction that Skaggs' testimony could be considered only as to Gurule, "Harold Baker's position is prejudiced" by the failure similarly to limit Roten's testimony (1584-85).

B. *The Decision of the Court of Appeals*

The opinion of the Court of Appeals mentioned the facts only briefly.[10] After identifying the positions held by the defendants, it simply recited that they were convicted of mail fraud because of "fictitious claims," paid by the Santa

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[10] The opinion of the Court of Appeals disposed of the appeals to that court both of Gurule and of petitioner. Gurule is not seeking review in this Court.

Fe, on which "Baker received 3½% and Gurule received 7½%"; that the "scheme" was detected when Gurule "sought to engage another supplier in a similar scheme but was refused and reported"; and that, "when confronted with the misdeeds and requested to resign, Gurule made personal admissions which were later admitted into evidence." (App. ii-iii). Petitioner's conviction was upheld despite the good faith defense by reason of the "secrecy of the scheme and the personal profit received by Baker" (App. viii).

The confrontation issue was disposed of as follows (App. ix):

> "Finally, it is the contention of appellant Baker that he was denied his right of confrontation of witnesses used against him. Mr. Leonard Roten, a prosecution witness, testified that he became suspicious and checked invoices to investigate for any dishonesty. Then Roten requested that Gurule resign at which point Gurule made a confession according to Mr. Roten. Tr. Vol. III, pages 383, 384; Tr. Vol. VI, pages 1036, 1045, 1046.
>
> "It is apparent that the testimony that might be considered as a confession under the rule in Bruton v. United States, 391 U.S. 123 (1968) did not incriminate Baker, and as a matter of fact did not mention him. The statement incriminated no one but Gurule and Gurule was cross-examined by Baker's counsel on the alleged confession. Thus, it is evident that *Bruton, supra,* is inapposite."

REASONS FOR GRANTING THE WRIT

In upholding the admission against petitioner of Roten's testimony concerning Gurule's confession, the decision below decided a constitutional question in a way conflicting with *Bruton* v. *United States,* 391 U.S. 123 (1968) and with numerous decisions of other Courts of Appeals. *See, e.g., O'Neil* v. *Nelson,* 422 F.2d 319 (9th Cir. 1970), *cert. granted,* 91 S. Ct. 136, No. 336, O.T. 1970 (Nov. 9, 1970); *Davis* v. *Sigler,* 415 F.2d 1159 (8th Cir. 1969); *West* v. *Henderson,* 409 F.2d 95 (6th Cir. 1969); *Townsend* v. *Henderson,* 405 F.2d 324, 329 (6th Cir. 1968); *United States ex rel. Labelle* v. *Mancusi,* 404 F.2d 690 (2d Cir. 1968); *United States* v. *Jones,* 402 F.2d 851 (2d Cir. 1968);[11] *Serio* v. *United States,* 401 F.2d 989 (D.C. Cir. 1968);[12] *Atwell* v. *United States,* 398 F.2d 507, 510 (5th Cir. 1968).

1. The conflict with *Bruton* is egregious. Its rule is this (391 U.S., at 137):

> " . . . Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. . . . "

The present case is an *a fortiori* case from *Bruton* and violates the Sixth Amendment's requirements of confronta-

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[11] Reversing *United States* v. *Jones,* 374 F.2d 414 (1967), following vacation and remand, 392 U.S. 299 (1968).

[12] Reversing *Serio* v. *United States,* 377 F.2d 936 (1967), following vacation and remand, 392 U.S. 305 (1968).

tion, even apart from consideration of any question as to the precise scope of the *Bruton* decision. For here, in this joint trial, the District Court repeatedly refused to admonish or instruct the jury that Gurule's confession was not to be considered in connection with the determination of petitioner's guilt. Petitioner was not even accorded pre-*Bruton* protection.

2. Moreover, even if a limiting instruction had been given—rather than the District Court's implicit instruction to the jury that they *could* consider Gurule's confession as evidence of petitioner's guilt—the decision below would still be in flat conflict with *Bruton.*

The Court of Appeals attempted to distinguish *Bruton* on two grounds: first, that Gurule's confession "incriminated no one but Gurule" and, second, that "Gurule was cross-examined by Baker's counsel on the alleged confession." (App. ix). The first ground of distinction is completely insupportable on the evidence of record, and the second ground is in conflict with the principles underlying *Bruton* and the holdings of other Courts of Appeals.

First, there was no warrant for the arbitrary assertion that Gurule's confession incriminated "no one but Gurule." There was no question but that Gurule and Baker were both directly involved in a pattern of dealings, whereby the railroad would submit purchase orders for railway equipment items against which Hills would ship substitute items ordered by officials and other employees of the railroad. It was clear that Gurule was necessarily and admittedly assisted by petitioner in carrying out the transactions with the Santa Fe. Petitioner freely acknowledged

that he procured the substitute items and invoiced them to the railroad. His sole defense, like Gurule's, was good faith—a good faith belief that the Santa Fe had authorized the substitution practice. Petitioner was the only other person indicted with Gurule. It is impossible to exclude the contingency—indeed the likelihood—that petitioner's defense was crippled in the jury's eyes by Roten's damning testimony that Gurule extrajudicially confessed to bad faith and acknowledged that the practice was unauthorized.

As the only Hills' employee charged with complicity, petitioner was patently stained by Roten's testimony. Roten expressly testified that his personal dealings with "Hill's Auto Electric" stimulated the investigation of "kick-backs" and "dishonesty" leading to his extraction of Gurule's confession. (P. 10, *supra*).[13] The jury was fully informed that Gurule had not conducted the transactions by himself, but had been assisted by petitioner. Compare *Serio* v. *United States, supra,* 401 F.2d at 989; *United States ex rel. Labelle* v. *Mancusi, supra,* 404 F.2d at 692.

The inculpatory impact of Gurule's confession on petitioner was compounded by the fact that the District Court gave a limiting instruction that Skaggs' testimony could not be considered against petitioner, but declined any such instruction with respect to Roten's account of Gurule's confession. The effect of this was to suggest to the jury that Roten's testimony could be considered against petitioner. In light of this, the declaration of the Court of

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[13] Two Santa Fe employees had previously testified that they had arranged through "Baker" to obtain automobile repairs for which they were never charged. (See p. 10, n. 9, *supra*).

Appeals that Roten's testimony did not implicate petitioner is flatly at variance with the way the case was submitted to the jury.

Secondly, the Court of Appeals fell into an equally serious error in attempting to distinguish *Bruton* on the theory that confrontation was available here because "Gurule was cross-examined by Baker's counsel on the alleged confession" (App. ix), and thus there was no violation of petitioner's Sixth Amendment rights. While Gurule was indeed so cross-examined, he denied making the confession. The result was that Gurule's extra-judicial confession was received in evidence and considered against petitioner without any effective confrontation by petitioner. Assuming *arguendo* that a co-defendant's confession is ever admissible, " 'effective confrontation of [Gurule] was possible only if [Gurule] affirmed the statement as his.' " *Bruton, supra,* 391 U.S. at 127, quoting *Douglas* v. *Alabama,* 380 U.S. 415, 420 (1965). Gurule made no such affirmation. By controverting Roten's testimony he foreclosed petitioner's right of cross-examination.

The Court of Appeals for the Eighth Circuit has correctly so perceived. As it ruled in *O'Neil* v. *Nelson, supra,* 422 F.2d, at 321:

> "It is true that in O'Neil's case Runnels did take the stand and was thus available for cross-examination. But he did not 'affirm the statement as his'; he flatly denied making it. Under these circumstances, while the statement was admissible against Runnels, both as an admission or confession and for impeachment, it never became admissible against O'Neil. Yet it remained in the record, and *Bruton* tells us that the

court's instruction to the jury is, as a matter of law, ineffective.

"The damage done by the out-of-court statement was just what it would have been had Runnels refused to take the stand at all."

This view is in flat conflict with the holding below that *Bruton* was inapplicable because "Gurule was cross-examined by Baker's counsel" (App. ix). There is, moreover, an accelerating division of opinion among the Circuits concerning the effect of *Bruton* when a co-defendant takes the stand to deny third-party testimony of his extra-judicial confession, and inconsistent results even within the same Circuit. As the Sixth Circuit recently stated in an opinion comprehensively reviewing the pertinent authorities on the issue (*United States* v. *Sims,* 430 F.2d 1089, 1091 (6th Cir. 1970)):

" . . . This Circuit has steered a somewhat inconsistent course on the question of whether the rationale behind *Bruton* would apply in a situation where a co-defendant, having made an inculpating statement which also implicates another defendant, later at trial takes the stand and denies the statement. [Citing cases] . . . It appears that several other Circuits are also in disagreement on this question. [Citing cases] . . . "

The *Sims* Court then—in diametric opposition to the Eighth Circuit's above-quoted position—reached the following conclusions (*ibid.*):

"Our resolution of this narrow issue can be briefly stated. A defendant is not denied his Sixth Amendment right to confrontation when a codefendant's incriminating statement, which implicates the defendant, is used against the codefendant during trial if subse-

> quently the codefendant takes the stand in his own behalf. The right to confrontation would then exist for the defendant regardless of whether the codefendant denies or admits making all or part of the incriminating and implicating statement. This rule presupposes that the trial court gives adequate cautionary instructions on the limited use to be made of the incriminating statement. Accordingly, we choose not to, nor do we believe that the reasoning in *Bruton* can be extended beyond the limited facts of that case. . . . "

The result reached below and by the Sixth Circuit in *Sims* clearly misconceives *Bruton*'s emphasis on the constitutional necessity of "effective confrontation" (391 U.S., at 127).[14] Their position provides the shadow, but not the substance, of confrontation and cross-examination. Here, for example, Roten's testimony of Gurule's confession was pure hearsay as to petitioner. It did not and could not represent the underlying primary facts, but only what Roten had allegedly heard about the matter from Gurule. By cross-examining Roten, petitioner could only have elicited Roten's response that he was quoting Gurule.

The sole declarant was Gurule. But because Gurule denied the confession, petitioner could not meaningfully cross-examine him—to establish, for example, that Gurule's alleged extrajudicial acknowledgment of bad faith was based on circumstances which did not impair petitioner's good faith. Gurule only embellished the denial under petitioner's cross-examination as to the details of the Gurule-Roten meeting (1308-09).

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[14] There is nothing to the contrary in *Dutton* v. *Evans*, 91 S.Ct. 210, 219 (1970). Distinguishing *Bruton*, the plurality opinion there carefully noted that the issue did not "involve a joint trial" and involved a "co-conspirator exception to the hearsay rule long established under state statutory law."

The result was that petitioner, at best, was helplessly entwined in a contest of credibility between Roten and Gurule. Petitioner could gain little from Gurule's repudiation of Roten's story. The jury could hardly be impressed by the testimony of a self-interested defendant, caught up in a web of inconsistency. In such a situation, the co-defendant's fate is inevitably tied to that of the other defendant. Prejudice is bound to follow from the jury's likely rejection of a self-serving contradiction by the fellow defendant. And as this case illustrates, the results can be disastrous. When evidence was received that Gurule had lied about Sherrard (p. 12, *supra*), petitioner was trapped by the collapse of Gurule's credibility. The damage to petitioner was all the more devastating because he was refused even the minimal safeguard of a limiting instruction.[15]

In short, a co-defendant is often better off—as petitioner might well have been here—when the other, confessing defendant has " 'affirmed the statement as his.' " *Bruton* v. *United States, supra,* 391 U.S., at 127. This at least affords the co-defendant an opportunity for cross-examination to elicit facts exonerating him from the impact of the extra-judicial confession.

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[15] The case against petitioner was hardly "overwhelming." *Harrington* v. *California,* 395 U.S. 250 at 254 (1969). Petitioner's boss, Wilson, testified at length that there was an agreement with the Santa Fe authorizing petitioner's course of dealing. (Pp. 5-6, *supra*). At least two railroad purchasing officials admitted to the FBI that the "bootlegging" of substitute items was commonly and openly practiced by the Santa Fe's purchasing department in Albuquerque. (Pp. 7-8, *supra*). "Plainly, the introduction of [Gurule's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination . . ." *Bruton* v. *United States, supra,* 391 U.S., at 127-28.

As the *Sims* case, *supra,* demonstrates, the treatment of *Bruton* in the context of a repudiated extra-judicial confession is becoming an increasingly current problem. The conflict which existed even prior to *Sims* was a factor, we take it, leading this Court to grant certiorari in *Nelson* v. *O'Neil,* No. 336, O.T. 1970, *cert. granted* November 9, 1970. However, whatever may be the resolution of the conflict of circuits in this Court's decision in the *O'Neil* case, the judgment below is erroneous since the failure to give a limiting instruction was clear error even apart from the rule announced in the *Bruton* case.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted. This case not only presents the same issue of conflict presented by the *O'Neil* case but additional factors suggesting error in the decision below and meriting this Court's review.

Should the Court be disposed, however, to defer action on this petition for certiorari until it decides the *O'Neil* case, we would suggest the following course of action. If *O'Neil* is affirmed, we respectfully suggest that this petition be granted and the judgment below summarily reversed, since the alternative holding—that Gurule's confession did not inculpate petitioner—is clearly insubstantial, particularly in the absence of an instruction that it could not be considered against petitioner. Should *O'Neil* be reversed, we respectfully suggest that certiorari be granted to consider the question whether, apart from *Bruton,* petitioner's Sixth Amendment right of confrontation was violated be-

cause the District Court's instructions allowed the jury to consider Gurule's confession against petitioner.

Respectfully submitted,

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January, 1971

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

September Term, 1970

No. 605-69 and No. 606-69

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN E. GURULE,

Defendant,

—and—

HAROLD K. BAKER,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D. C. CR-23563)

E. DOUGLAS LATIMER, Albuquerque, New Mexico, *for Appellant John E. Gurule.*

MICHAEL M. RUECKHAUS, Albuquerque, New Mexico, *for Appellant Harold K. Baker.*

VICTOR R. ORTEGA, United States Attorney, Albuquerque, New Mexico (John A. Babington, Assistant United States Attorney with him on the brief), *for Plaintiff-Appellee.*

Before:

LEWIS, *Chief Judge,* and
HICKEY and HOLLOWAY, *Circuit Judges.*

HICKEY, *Circuit Judge.*

This is a direct appeal from a conviction of mail fraud, 18 U.S.C. § 1341, at a jury trial in the Federal District for the District of New Mexico. Twice indicted by a grand jury, appellants Gurule and Baker were found guilty of nine counts of mail fraud.

The issues raised attach the overbreadth of the subpoena duces tecum issued by the grand jury, the failure to instruct on appellant's theory of the case, and the sufficiency of the evidence to convict under the mail fraud charges.

The facts disclose that Gurule, an employee of the Santa Fe Railroad authorized to make purchases for the Railroad, was also employed by Hills Auto Electric Company, a supplier for the Railroad. Appellant Baker was an employee of Hills Auto who acted as Manager and received, as additional compensation, a percentage of the company's sales to the railroad.

The purchase orders, records and invoices of the two companies disclosed a series of purchases of miscellaneous goods which were charged to the Railroad through a series of fictitious claims presented to and paid by the railroad company. The checks sent from the railroad company to Hills Auto Electric were transmitted by the United States

Mail. The appellants received a percentage of the amounts charged to the railroad. Baker received 3½% and Gurule received 7½% of annual sales to the railroad. The distribution was made after Hills had deposited the checks transmitted by mail to them from the railroad company.

The scheme of ordering these goods and charging them as railroad equipment was not detected for a number of years. Ultimately Gurule sought to engage another supplier in a similar scheme but was refused and reported. Thereafter, when confronted with the misdeeds and requested to resign, Gurule made personal admissions which were later admitted into evidence.

The attack on the Grand Jury subpoena duces tecum resulted from a subpoena first issued to the president of Hills Auto Electric, commanding him to bring his company's books and records to the Grand Jury. He complied with the subpoena duces tecum and the records were used to obtain an indictment. The indictment was quashed because of irregularity of procedure in the Grand Jury, and a new indictment was obtained within one month. A new subpoena was served on both the president of the Corporation and the accused manager; a motion to impound the records for the trial was made and granted. The foregoing gave rise to the extensive attack on the procedure used to obtain evidence for the Grand Jury.

Corporate records were obtained for inspection by the Grand Jury through the use of a subpoena duces tecum. "Compliance with a Grand Jury subpoena duces tecum is Compulsory." United States v. American Stevedores, 16 F.R.D. 164, 171 (S.D.N.Y. 1954). "[B]ooks and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal

privilege on the part of their custodian." Curcio v. United States, 354 U.S. 118, 122 (1957). Therefore the attacks of either Gurule or Baker cannot be on the basis of personal privilege against self-incrimination or illegal search and seizure.

The only question then presented is whether the language of the subpoena duces tecum was overbroad or made an otherwise unreasonable request. The language of the subpoena defined the specific records of dealings between the Santa Fe Railroad and its employees and the Company for a period of three years.[1]

> "Federal courts have inherent power over their process to prevent abuse, oppression and injustice and the process of the court comprehends proceedings before the Grand Jury and the means whereby witnesses are compelled to attend such proceedings. [citing cases] However, it has been consistently stated that there should be no curtailment of the inquisitorial power of the Grand Jury except in the clearest case of abuse, and mere inconvenience not amounting to harassment does not justify judicial interference with the functions of the Grand Jury." United States v. Johns-Manville Corporation, 213 F.Supp. 65, 72 (E.D. Penn. 1962).

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[1] The portion of the subpoena duces tecum objected to commanded Gurule and Baker to "bring with you all of your financial records and correspondence relating to business dealings of your company with the Atchison, Topeka & Santa Fe Railway and any and all of its employees, or on their behalf or instruction, including but not limited to books of account, payroll records, purchasing records, sales records, invoices, sales slips, delivery receipts, bank ledger sheets, cancelled checks and other bank records, inventory records, and records including invoices, sales slips, delivery receipts, purchase orders, and the like relating to purchases made by your company for delivery, by resale or otherwise, to said railway co., or any or all of its employees, or on their behalf or instructions, for the period of January 1, 1965 to December 31, 1967, both inclusive." Tr. Vol. II, page 13.

Three components are suggested by the Supreme Court cases. See In Re Grand Jury Subpoena Duces Tecum, etc., 203 F.Supp. 575, 578 (S.D.N.Y. 1961). They are (1) the subpoena may command only the production of things relevant to the investigation being pursued; (2) specification of things to be produced must be made with reasonable particularity; and (3) production of records covering only a reasonable period of time may be required. An examination of the language of the subpoena seems to satisfy the components particularly in view of the fact that the records subpoenaed in March, 1968 were limited to the "period of January 1, 1965 to December 31, 1967, both inclusive." Because the requested papers were fairly recent, less specificity was required. *See* 8 Moore's Fed. Practice, Criminal Rules, § 17.07. We cannot say that the trial court was clearly in error when he concluded the subpoena duces tecum was neither unreasonable or oppressive.

Objections to the instructions given the jury were heard after the jury retired to consider the verdict. This does not comply with Rule 30 Fed. R. Crim. Pro. and would justify our failure to consider the objections. Osborn v. United States, 253 F.2d 646 (10th Cir. 1958). However, in this case, we have chosen to consider it.

Appellants contend that the instructions given on their theory of the case were not adequate and the instructions tendered by them more clearly defined the good faith defense and the fact that the Santa Fe was not an unwilling victim. The court satisfies its duty by giving instructions which sufficiently cover the case and which are correct. Elbel v. United States, 364 F.2d 127 (10th Cir. 1966), cert. denied 384 U.S. 1014, reh. denied 386 U.S. 939. We examined the instructions as a whole to determine whether the defenses were adequately presented. The instructions

given by the court[2] clearly set forth the willing victim and the good faith theory.

The instructions requested[3] related to the defenses of willing victim and good faith, but they went further than

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[2] "Now it is the contention of the defendants that the acts charged in the Indictment, even if done, did not defraud the Railroad, as they claim all acts done were for some purpose beneficial to the Railroad, and were authorized by an agreement or understanding with appropriate officials of the Railroad.

"It is the further contention of the defendants that even if the acts did constitute a fraud on the Railroad, that they, the defendants, did not act with intent to defraud, but that all of their actions were in good faith and with the honest belief that they were lawful and legitimate. Good faith is a complete defense to the crime of mail fraud.

"In determining whether the defendants acted in good faith, or with intent to defraud, you may consider all the acts and circumstances in the case.

"As with all other elements of the offense charged, the burden is on the Government to establish beyond a reasonable doubt that the acts did constitute a fraud on the Railroad, and that the defendants acted with specific intent to defraud." Tr. Vol. IX, pages 1571, 1572.

[3] Defendant's Instruction No. 14—"Therefore, if you find from the evidence that the items mailed by Atchison, Topeka & Santa Fe Railway which were done pursuant to an agreement between the Atchison, Topeka & Santa Fe Railway and Hills Auto Electric, then in that event, I instruct you that the Atchison, Topeka & Santa Fe Railway was not an unwilling victim."

Defendant's Instruction No. 17—"You are instructed that railways are regulated and supervised by the Acts of Congress Relating to Interstate Commerce, sometimes known as the 'Transportation Act' or the Hepburn Act. Sec. 20 Par. 3 of that Act provides that the Interstate Commerce Commission is authorized to prescribe a uniform system of accounting. Sec. 20 Par. 4 of that Act enjoins the Interstate Commerce Commission from proscribing a system of records for depreciation charges and forbids any carrier from including under 'operating expenses,' any depreciation charge in any form whatsoever other than as proscribed by Congress. In so doing, Congress recognized the essential distinctions between 'property' accounts and 'operating' accounts and also between 'capital' and 'earnings;' and therefore, Congress recognized that uniformity between various carriers was essential for proper regulation and supervision.

"You may accept this law concerning any possible effect that it may have relative to your judging the credibility and believability

presenting a defense in that they inferred malfeasance on the part of the Railroad. The probable malfeasance of the railroad company was not an issue and certainly would not justify the commission of the offense for which appellants

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of the testimony of the officers, agents and employees of the Atchison, Topeka & Santa Fe Railway who have testified in this case; as well as any interest they may have relative to their testimony." Kansas City Ry. v. United States, 231 U.S. 420 (1913), 49 U.S.C. § 20, Pars. 3 and 4.

Defendant's Instruction No. 18—"You are instructed that, in light of the Transportation Act, 'you may find or infer that the Atchison, Topeka & Santa Fe Railway devised a system whereby certain items necessary to the Railway were substituted for other items; and, that this system of substitution was motivated by the Railway's desire to comply with the 'Transportation Act,' you must find the Defendants not guilty of the offense charged."

Defendant's Instruction No. 19—"You are instructed that since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the Interstate Commerce Commission of the supervising and regulating powers conferred upon it by Congress . . . and that railroad including the A.T. & S.F. are required to maintain accounts for the purpose . . .

"You may accept this law concerning any possible effect that it may have relative to your judging and credibility and believability of the testimony of the officers, agents and employees who have testified in this case—as well as any interest they may have concerning their testimony. Kansas City So. Ry. v. U. S.—231 U.S. p. 445."

Defendant's Instruction No. 20—"You are instructed that Congress has enacted Section 20 of the Interstate Commerce Act, sometimes known as an act to regulate Congress (Commerce). Under this Act, Congress has authorized the Interstate Commerce Commission to inquire as to the business which the carrier does and require the keeping of the uniform acts in order that the Commission may know just how the business of the Railroad is carried on and with the view to regulate that which is in its power. To be informed of the business of the Railroad, so far as its bookkeeping and records are concerned, it may have full knowledge and full disclosures thereof, in order that it may ascertain whether

were indicted. We conclude the instructions as a whole adequately presented the defenses and also the theory of accused's defense. Appellants are not entitled to elaborate such defenses into charges against the Corporation which were defrauded by actions of appellants themselves.

It is contended that appellant Baker did not participate in the scheme and therefore should not have been convicted. The secrecy of the scheme and the personal profit received by Baker for his involvement hereinabove related aided the jury in making the determination that he was involved. Wall v. United States, 384 F.2d 758, 762 (10th Cir. 1967); Holt v. United States, 94 F.2d 90 (10th Cir. 1937). The instructions given covered the facts of the case at bar and the jury made the determination. The tendered instructions did not direct themselves to the facts herein involved and therefore were properly denied.

Appellants contend that there is insufficient evidence to show a causal connection between the alleged scheme and the use of the mail. The contention makes important the elements of the offense charged under 18 U.S.C. § 1341. The elements are (a) a fraudulent scheme, and (b) the use of the mails for the purpose of executing the fraudulent scheme.

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forbidden practices and discriminations are concealed in certain acts and whether charges of expenses are made against one part of the business which ought to be made against the other.

"You may consider this precept of law in your deliberations regarding the weight of the testimony to give officers, agents and employees of the Railroad as it applies to the Railroad's knowledge, acquiescence in, or ratification of the understanding of the defendants concerning an agreement between the Santa Fe Railroad and Hills Auto Electric in permitting the purchase of personal items and other items by what has been testified to be the bootleg system.

"You may also consider this instruction as it applies to the good faith of the defendants." Tr. Vol. VIII, pages 1437, 1439-1442.

The alleged scheme was the procurement of purchase orders for merchandise charged to the railroad company and paid for by it but never delivered. The material benefit to the appellants was a share of the sales price received by Hills Auto Electric from the Santa Fe Railway. There was evidence to the effect that the transmission of this sales price check which completed the scheme from Santa Fe to Hills Auto Electric was by United States Mail. Appellate Courts view the evidence in the light most favorable to the government, and do not weigh conflicting evidence or consider credibility. Havelock v. United States, No. 680-69, Filed 6-18-70 (10th Cir. 1970). Relying upon the foregoing principles we conclude that a causal connection was shown and the mails were used to accomplish the execution of the scheme.

Finally, it is the contention of appellant Baker that he was denied his right of confrontation of witnesses used against him. Mr. Leonard Roten, a prosecution witness, testified that he became suspicious and checked invoices to investigate for any dishonesty. Then Roten requested that Gurule resign at which point Gurule made a confession according to Mr. Roten. Tr. Vol. III, pages 282, 383, 384; Tr. Vol. VI, pages 1036, 1045, 1046.

It is apparent that the testimony that might be considered as a confession under the rule in Bruton v. United States, 391 U.S. 123 (1968) did not incriminate Baker, and as a matter of fact did not mention him. The statement incriminated no one but Gurule and Gurule was cross-examined by Baker's counsel on the alleged confession. Thus, it is evident that *Bruton, supra* is inapposite.

We therefore affirm the trial court.

APPENDIX B

Judgment

September Term, October 12, 1970

No. 605-69

UNITED STATES OF AMERICA,

Plaintiff-Appellee

—VS.—

HAROLD K. BAKER,

Defendant-Appellant

Before:

HONORABLE DAVID T. LEWIS, *Chief Judge;* and
HONORABLE JOHN J. HICKEY and
HONORABLE WILLIAM J. HOLLOWAY, JR., *Circuit Judges.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that Harold K. Baker, appellant, surrender himself to the custody of the United States Marshal for the District of New Mexico, in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

HOWARD K. PHILLIPS, CLERK

By: s/ JOYCE R. STUCK
Joyce R. Stuck
Deputy Clerk

APPENDIX C

Order Denying Rehearing

September Term, November 18, 1970

No. 605-69

UNITED STATES OF AMERICA,

Plaintiff-Appellee

—VS.—

HAROLD K. BAKER,

Defendant-Appellant

Before:

HONORABLE DAVID T. LEWIS, *Chief Judge;* and
HONORABLE OLIVER SETH and
HONORABLE WILLIAM J. HOLLOWAY, JR., *Circuit Judges.*

Upon consideration of the petition for rehearing, it is ordered that said petition be and is hereby denied.

APPENDIX D

Statute Involved

[Title 18, U.S. Code, ch. 63—Mail Fraud]

§ 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.